

In the United States

Circuit Court of Appeals

For the Ninth Circuit

SOLOMON RIPINSKI,

Appellant,

vs.

G. W. HINCHMAN, et al,

Appellees.

NO. 2015.

Petition of Appellant for a Rehearing

J. H. COBB,

Attorney for Appellant.

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PETITION FOR REHEARING

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The importance of the questions involved in this case, and decided by the Court, and the fact, as it seems to us, that this Court in making the decision herein on January 13th, 1913, overlooked certain undisputed facts in the record which should have controlled the decision, appear to us to warrant us in asking a rehearing. We are fully aware of the great labor which the litigation in this Circuit imposes upon your Honors, but we also know that that labor, great as it is, will not be weighed against the importance of having every case decided rightly upon established principles which are to serve as precedents to guide the lawyer in advice to clients, and the decisions of the courts in future controversies.

For these reasons we earnestly beg your Honors for a rehearing of this cause upon the following grounds, to-wit:

First: The court erred in holding that there was not a fatal misjoinder of plaintiffs, and causes of action.

On the former appeal this court held that there was a misjoinder of causes, (181 Fed. 786) following

the decision in *Utterback vs. Meeker*, 47 Pac. 428, and authorities there cited. In the able and exhaustive opinion then filed, it is pointed out:

“The evidence of plaintiffs tends to show so far as it is necessary to allude to it, that Harry Fay and five or six others went to Haines some time in December, 1897, and that they located upon certain lots or parcels of land within the limits of the town-site of Haines as subsequently surveyed; that still others made like locations later, extending down to the time of the institution of this suit, and even thereafter; that some of these locators went into possession and made improvements, and in a few instances they have continued to live upon such premises to the present time, utilizing the same for business or dwelling purposes. In many instances the possession has passed to others, either through mere delivery, or by bill of sale or deed, and the successors, either immediate or remote, now occupy the premises. In other cases, parties are in occupancy where no previous location has been made, perhaps claiming by right of mere possession, or under some bill of sale or deed from some alleged prior occupant. In still others, locations have been made for the purpose of trade and manufacture, the location notices asserting that the lands specified ‘contains neither coal nor the precious metals nor any town-site nor any land to which the natives of Alaska have prior rights.’ There are thirty-four parties plaintiff to the suit, and to illustrate the style of holdings relied upon as a basis for the cause of suit, it will be in-

structive to trace the titles of some of the plaintiffs, which are exhibited by the proofs and the records. In order to prevent confusion—the lots as numbered on the Fogelstrom plat begin on the east side and run west, for the south tier of each block from 1 to 6, and for the north tier from 7 to 12. The map to which reference is had here is one compiled by Elias Ruud. It is offered in evidence a ‘Plaintiffs’ Exhibit No. 2,’ and may be termed the Fogelstrom map. The lots shown on Plaintiffs’ Exhibit No. 1, for the south tier in general are numbered from east to west, running from 1 to 6, and for the north tier from west to east, running from 7 to 12. The exceptions to this numbering are blocks 1 and 2. As to block 1 the south tier is numbered irregularly, beginning at the east and running from 1 to 11, and the north tier regularly, beginning at the west and running from 12 to 17. As to block 2, the south tier again is numbered irregularly from east to west, the numbers running from 1 to 8, and the north tier regularly from west to east, running from 9 to 14. The locations and transfers presumably are according to the Fogelstrom or Ruud map or plat, Plaintiffs’ Exhibit No. 2. H. Fay is a party plaintiff. He claims parcel 4, block 1, of the town of Haines. This included portions of lots 3 and 4 as designated on the Fogelstrom map. A location notice is offered, Harry Fay as locator, whereby he located and claimed for residence and business purposes lots 3 and 4, situated in the town of Haines, as shown on the survey and plat of said town, made by Walter Fogelstrom,

civil engineer. This notice bears date December 14, 1897. There is manifestly some mistake as to the date, for the Fogelstrom plat was concededly not made until a later date, and a location could not then have been made as shown on the survey and plat because it was not then in existence. But, be that as it may, Fay testifies that he had been the owner in possession of Lot 4, Block 1 ever since, occupying it for business and dwelling purposes. This alludes to lot 4, Exhibit 1. In derogation of his title, however, a deed is an evidence showing that Fay and wife conveyed the east half of lot 4, Fogelstrom map, to James Fay October 2, 1903. Thus stands Harry Fay's title and right to possession. G. W. Hinchman, also a party plaintiff, claims to be the owner and in possession of lots 7 and 8, block 3, Exhibit 1, which corresponds with lots 11 and 12, Fogelstrom plat. Hinchman testifies that lots 7 and 8 are his lots; that he has occupied them since the fall of 1903; that he bought lot 8 from M. W. Bane and the other from Bjornstad, and then describes improvements. The record shows deed from M. W. Lane to George W. Hinchman to lot 11, Fogelstrom map, of date October 8, 1903, and deed from M. W. Lane to Carl Bjornstad to lot 12, of date July 5, 1907. It does not appear that any location was ever made of these lots by any one. Thomas Vogel claims lot 1, block 2, Exhibit 1, which corresponds in a measure with lots 1 and 2, Fogelstrom map. He testifies, under the name of Tim Vogel, that he is the owner of part of lot 1 and 45 feet of lot 2. He says he did not locate but bought

from E. L. Wilson. The record shows that location was made of lot 1 by Daniel Morris January 26, 1898, and of lot 2 by A. Blonde February 12, 1898. There are no conveyances from either Morris or Blonde. Vogel conveyed to W. H. Spencer, March 13, 1903, a parcel lying in the northeast corner of lot 1, being 50 feet east and west by 20 feet north and south. Spencer and wife conveyed to Tom Valeur of date July 19, 1904, a parcel 40 feet in width off the north end of lots 1 and 2. There are no conveyances other than these. S. J. Weitzman claims lot 3, block 1, and R. L. Weitzman, his wife, lots 12 and 13 of the same block, according to Exhibit 1. These lots cover parts of 3 and 4 and 11 and 12, Fogelstrom map. Weitzman testified that he located lot 3, and that his wife bought 12 and 13 from Cronen, the original locator. The record shows that Harry Fay located lots 3 and 4, Fogelstrom map, December 14, 1897, and that Harry Fay and wife deeded to James Fay lot 3 and east half of lot 4 October 2, 1903. As to lots 12 and 13, or 11 and 12 Fogelstrom map, the records show no location whatever. E. B. Cronen conveyed these lots, July 6, 1901, to R. L. Weitzman, and on October 30, 1902, R. L. Weitzman and husband conveyed 25 feet off the south end to D. Butterick. W. W. Warne sues for lots 7, 8, 9, 10, and 11 of block 2, Plaintiff's Exhibit 1. These correspond with 5, 6, 10, 11, and 12, Fogelstrom map. As to these lots W. B. Stout testifies that he thinks Reverend Mr. Warne claims them; that Warne is now in North Dakota somewhere, and that he placed some foundations for build-

ings on the lots and built a good fence around them several years ago. The record shows that lots 10, 11, and 12 were located by Adele Bigford December 14, 1898, and that lot 10 was again located September 6, 1906 by Cortes Ford, lot 11 on the same date by Frank Bruskers, and lot 12 by T. Wilder Ford. As it pertains to lots 5 and 6, Fegelstrom plat, there has been neither location nor deed of any sort. Kate Kabler claims to be the owner of lot 1, block 4. As to this parcel the two maps correspond. It is shown that Mrs. Kabler is not in Haines, and that the lot is unoccupied; that it has a house upon it, but no other improvements. The record shows that W. W. Warne located it December 15, 1897, for trade and manufacturing purposes, and that E. Sanderson again located the same lot, under the alleged town-site, January 31, 1898. These instances well illustrate the record testimony respecting the title to the property concerned. In other cases, the alleged owners do not appear to testify to their claims and ownership, but witnesses were called and asked, in a general way, who were the owners of such and such lots, with the answers that several claimants were such owners. Beyond this, Plaintiffs' Exhibit 1 further shows that a number of the lots of the town of Haines, lying in conflict with survey No. 573, are wholly vacant and unoccupied, and in actual fact no one is in possession or claiming any interest therein. So it thus appears that there are all shades of claim of title and possession as it respects the lots of the town, lying in conflict survey No. 573, from

that of the claimant who located his lot and has continued in unbroken possession to the present time, to that of him who has the merest shadow of possession, as well as the vacant lots without a pretense of claim of title. occupation, or possession.”

Further on and answering the contention of the plaintiffs that this was in reality a suit on the part of the citizens of the town of Haines “to remove all the property embraced within the limits of the town, as platted, the cloud cast upon its title by appellants’ Homestead Claim,” as the court says:

“The answer to this contention is, that the suit was not so instituted. But if it had been, the case would be no different, as the basis thereof must needs be the claim and title of the individuals, not of the town. Indeed, the town can make no claim of title to any of the lots and blocks within its borders, especially an unincorporated town, which practically had no borders. The rule that a court of equity will interpose its jurisdiction to avoid a multiplicity of suits ‘where a number of persons have separate and individual claims and rights of action against the same party A., but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone’ (1 Pom. Eq. Jur., Sec. 245), is sought to be invoked, but we do not deem it applica-

ble, for the reason that the plaintiffs' claims do not all arise from the same common cause, neither are they governed by the same legal rule, nor do they involve similar facts. One of the plaintiffs, possibly two or three, is claiming as an original locator within the alleged townsite, having continued in unbroken possession to the present time, and being now in possession. Others show title simply by exhibiting a deed or deeds from someone else, without even depending upon any location under the townsite, or tracing their holdings or possessions thereto. Others show mere possession, without else, and yet others show location for trade and manufacturing purposes, discarding the townsite, with an attempt to trace title and possession to such location. It is thus very apparent that the titles of the several plaintiffs, being held in severalty, are not of the same or similar kind or description, and the rule specified does not meet the case."

The case was reversed and remanded with instructions to dismiss the plaintiffs' bill.

Appellants Hinchman et al, thereupon filed a motion for a rehearing and attached to it a copy of the original complaint filed in the court below. This original complaint had attached to it, as an exhibit the adverse claim filed by the plaintiffs in the land office, and sets up a *joint* ownership and possession on the part of the plaintiffs of all the ground embraced in the defendants' homestead survey, (excepting a certain small portion.) The motion for re-

hearing was denied, *but without giving the defendant, Ripinsky, a further opportunity to be heard thereon*, the court modified the former decree, directing a dismissal of the bill, to the extent of directing in the court below "such other proceedings as to that court may seem proper." This court further said as to the original complaint, "That for all the purposes of prosecuting an action for the quieting of title as adverse claimants, under the statute the complaint appears to be sufficient." (186 Fed. 152.)

Upon the coming down of the mandate of this court, however, the plaintiffs did not go to trial upon the original complaint, which they had exhibited to this court in their motion for a rehearing, because that complaint as to the allegation of joint ownership and possession was untrue, and could not be sustained by a scintilla of proof. Plaintiff's therefore filed a Third amended complaint, which, in so far as the several ownership of plaintiffs is concerned is identical with the second amended complaint, which this court had held bad in the opinion reported in 181 Fed. 786. The only difference between the two complaints (the second, and the third amended,) is that the last alleged, and had attached to it the adverse claim filed in the land office.

On the second trial the evidence as to the ownership and possession of plaintiffs, was identical with the evidence on the first trial, which this court analyzed in the quotation above made. And from the additional evidence introduced on the second trial solely on the question of citizenship, the court might

have added, that it now appeared that some of the plaintiffs were admittedly aliens, some failed to prove citizenship, and some were citizens.

The question is then squarely presented whether in an adverse suit under the Alaska Statute, the ordinary and universally recognized rules of pleading governing joinder of plaintiffs and causes of action, is in any manner abrogated or changed.

On the second appeal in reaching the conclusion that there was no misjoinder, this court said:

"The question is again presented here, as it was on the first appeal, whether the plaintiffs were entitled to join in a bill of complaint in aid of the contest against the issuance of a patent to the defendant under his homestead application therefor. *Ripinski v. Hinchman*, 181 Fed. 786. As the cause was then presented, which was in the way of an ordinary suit to quiet title, it was held that such joinder was not permissible. The cause now comes here in a very different aspect. The complaint shows a cause in aid of the complainant's contest in the land office against the claim of *Ripinski* for a homestead patent.

"It is undoubtedly proper and regular under the statute for the settlers and occupants to petition the Secretary of the Interior to name a trustee to enter the lands so occupied for townsite purposes, who, when so named, would become the trustee or trustees for all, and thereafter administer the trust for all. There exists no good reason why they should not also join in a suit for contest against the issuance of a

patent prior to the time when a trustee or trustees may be named by the Secretary of the Interior for making such entry for townsite purposes. After the trustees are named and entry made, then the trustees would very properly represent the settlers and occupants. *Ashby v. Hall*, 119 U. S. 526; *Martin v. Hoff*, 64 Pac. 445. We think, in the present state of record, it was appropriate for the alleged settlers and occupants to join in the bill of complaint for the particular relief sought."

Neither of the cases cited, it seems to us, have any bearing upon the question of joinder; certainly they are not decisive of it. *Ashby v. Hall* was simply a suit between a town lot owner claiming the right to an alley adjoining his lot, against another to whom the townsite trustee had deeded such alley. The whole case turned upon the question of the powers of the trustee to make conveyance of the streets or alleys of the town. *Martin v. Hoff* was an action for a mandamus brought by one claiming a right to a lot in an entered townsite, to compel the trustee to convey in accordance with the law. In neither case was there any question of joinder raised. It may be true, however, that "After the trustees are named and entry made, then the trustees would very properly represent the settlers and occupants." For the trustees would then be clothed with the entire legal title, and could sue and be sued as any other owner. But we most respectfully but earnestly submit, that before there is any trustee, *or it is even determined that there ever will be a trustee, parties claiming in*

severalty, some as townsite locators, some as locators for trade and manufacture, some as mere squatters, some in possession and some out of possession, CAN-NOT unite in one suit to quiet title, not only as to what ground they claim, but also as to large portions of the survey they neither possess, occupy or claim. In any event the supposed trustee could only represent the townsite claimants, but not the claimants under the trade and manufacturing act; nor could such trustee in any event, represent the alien plaintiffs. Yet here the court has in affect affirmed a decree in favor of plaintiffs claiming under these diverse laws a number, if not the majority of whom are aliens, and cannot acquire title to the public lands.

It is true that by the statute the *controversy* is referred to the courts in aid of the land department. *But no new jurisdiction is conferred upon the courts, nor is any new procedure provided.* Such suits must be brought and prosecuted subject to the same rules of pleading and practice that govern in other cases. Speaking of the law providing for adverse suits in contests over mining claims, which as your Honors have truly said, is the prototype of the Alaska Statute, the Supreme Court of Nevada said: "The object of the law, as we understand it, was to require parties protesting against the issuance of a patent to go into the State courts of competent jurisdiction, and institute such *proceedings as they might under the different forms of action, therein allowed, elect*; and there try the rights of possession

to such claim and have the question determined. The Acts of Congress do not attempt to confer any jurisdiction not already possessed by the State courts; *nor to prescribe a different form of action.* If the parties protesting are in possession of the ground in dispute, they can bring their action under Sec 256 of the Civil Practice Act, (Stats. 1869, 239), or, if they have been ousted from the possession, they could bring their action of ejectment; and in either action 'the rights of possession' to such claim could be finally settled and determined. *We are of opinion that when the action is brought, whatever may be its character, it must be tried by the same rules, governed by the same principles, and controlled by the same statutes that apply to such actions in our State courts, irrespective of the acts of Congress."* (Italics ours.) 420 Min. Co. v. Bullion Min. Co., 9 Nev. 248.

The opinion in this case is by Judge Hawley, whose wide experience in mining litigation certainly entitle his views to great weight. See also *Iba v. Central Assn'* 42 Pac. 20.

The statute under consideration by the courts in rendering these decisions is the prototype of the Alaska Statute under which this suit was brought. Should it not then receive the same interpretation? If it should be so interpreted, then surely upon a further consideration, your Honors will not hold that the law permits a joinder of parties and causes of action in a suit under the statute that would not be tolerated in an ordinary suit to quiet title. Nor is this a mere technical objection. *The plaintiffs have*

all succeeded in obtaining practically all the relief sought. Yet it is perfectly obvious that if they had been compelled to sue separately, those whose claims post date the institution of this suit; those whose claims post date the official survey of defendant's homestead; those whose claims post date the record of the defendant's homestead notice; and those who were out of possession; and the alien plaintiffs, could not have succeeded under any possible theory of the case. Nor could any one singly have defeated the defendant to any part of the land he did not claim. Yet by the ruling complained of, and which we are now asking the Court to reconsider upon a rehearing, all these things have happened.

Second.

The evidence on the second trial was identical with that on the first, except that the plaintiffs offered in evidence a letter from the Commissioner of the General Land Office dated July 17th, 1905, from which it appeared that "George Vogel and 57 other settlers at Haines petitioned for a survey of the boundaries of the townsite, which petition had been favorably considered" &c. From this letter the Court concludes that "plaintiffs had proceeded as far as they could in the Land Office when the contest was brought on." In so holding this court must have overlooked the fact that George Vogel is not a party to this suit; nor is there the slightest evidence that any one of the other 57 petitioners are parties to this suit. Neither is there any evidence that the ground

sought to be surveyed embraced the Ripinski homestead. The petition, so far as the record shows, may have been suspended because of the proximity of the homestead survey, and the law which prohibits surveys in Alaska nearer than 80 rods where they abut upon the tide water. This whole matter was, so far as the record shows, one with which neither party to the suit had the slightest connection. Yet the court has used it as a basis for the conclusion that the plaintiffs had proceeded as far as they could in the Land Office.

Third.

The first trial and the decree then entered was set aside by this court, and a new trial, in effect, ordered. On the second trial the whole case was made, by the learned Trial Judge, to turn upon the proposition that the findings of the court on the first trial, where not expressly set aside by the Appellate Court were the "law of the case" and binding upon the Trial Court on the second trial. The Trial Court then held that it had nothing to do but marshal the findings of this court, and of the Trial Court into a decree. (Rec. 2015, pp. 76, 77.) The Trial Court, in effect, refused to pass upon any question, except that of the citizenship of the plaintiffs, all of whom he found to be citizens, *except six*. (Rec. 2015, p. 25.) In this condition of the record the case was brought into this court, and except the question of misjoinder, none of the points raised in the court below, and assigned as error, appear to have been

specifically considered or passed upon here; but the court has taken the record, and entered a decree thereon substantially as a Trial Court. In doing this we feel that many points which should have been more fully discussed at the bar, and in the briefs, have been overlooked. It was assumed that the court would consider the brier for the appellant, Ripinski, filed in Cause No. 1782, especially upon the facts. The court has found in effect, that the plaintiffs obtained prior possession of the ground in controversy after the purchase by Ripinski in December 2, 1897. (The question of the possession of the Dickinsons will be dealt with later.)

The loose, general statements of the plaintiffs, testifying in their own behalf, tend to sustain this conclusion. But we believe a fair and full consideration and analysis of this testimony will convince the court that this conclusion is not warranted.

And first as to the possession of Ripinski from and after Dec. 2, 1897.

Ripinski undoubtedly purchased from Mrs. Dickinson whatever property she had on Dec. 2, 1897. He undoubtedly intended to purchase and take fifteen acres; he undoubtedly moved into the buildings that had theretofore for many years been occupied by the Dickinsons. At that time there was no law in Alaska providing for the filing and recording of a homestead claim. The act was passed in March, 1903, and in June, 1903, he filed his notice of homestead claim. (Rec. 1782, p. 771.) An amended notice was filed in Dec., 1903. (Rec. 1782,

p. 776.) Now we think it must be conceded that if the plaintiffs, and those under whom they claim, had not acquired any possessory rights prior to these acts by Ripinski, then Ripinski had the better right. To defeat this claim it was incumbent upon the plaintiffs to show a right of possession to the particular parcel, or parcels, claimed by them respectively in the complaint. Now the facts are that except

J. G. Morrison, claiming part of parcel 1, Block 1,

S. J. Weitzman, claiming parcel 3, Block 1,

D. Butrich, claiming part of parcel 11, Block 1,

E. A. Adams, claiming parcel 14, Block 1,

J. G. Morrison, claiming parcel 16, Block 1,

G. C. DeHaven and T. Creedon, claiming parcel 17, Block 1,

Thomas or Tim Vogel, claiming parcel 1, Block 2,

Mary V. McIntosh, claiming parcel 1, Block 3,

E. J. Berger, claiming parcel 4, Block 3,

Karen Bjornstad, claiming parcel 5, Block 3, and

Kate Kabler, claiming parcel, Block 4,

not a single one of the plaintiffs showed possession or claim either in themselves or in their grantors to any one of the parcels sued for by them, respectively, antedating June 23rd, 1903.

The evidence upon the various cases made for the plaintiffs is all collected, and the record cited in our brief filed in cause No. 1782, pages 38 to 69 inclusive, and we ask the court to consider the same as a part of this petition without requiring it to be again printed herein. By far the greater number of those persons who did locate during the speculative period

of 1898, abandoned their locations and moved away. And of the plaintiffs named above, the evidence as to the date of the possession of most of them is very doubtful. And of those named D. Butrich, and E. J. Berger are aliens, (Rec. 2015, p. 25), and the citizenship of the others is doubtful. (Rec. 2015, pp. 58-75.)

Third.

The court declined to consider that Sarah Dickinson had any possessory right to any part of the 15 acres she sold Ripinski in Dec. 1897, excepting the portion of the tract that was fenced, and as to the rest held that "The real controversy hinges about the question of prior possession as between the parties litigant"; and we most respectfully ask the court to reconsider this holding, and whether the correct legal conclusion has been drawn from the facts *found by this court*.

These facts as stated by the court in the opinion rendered, are as follows:

"In 1878 George Dickinson, at the time married to an Indian woman named Sarah, being the representative of the Northwest Trading Company, established a trading post at Portage Cove, now known as Haines. He located a tract of land for trading purposes, and erected the buildings now occupied by the defendant. At Dickinson's request, an officer of the United States Steamship Jamestown surveyed the tract so located, and set the corner

posts. It is in evidence that Dickinson constructed an inclosure around the tract, consisting partly of brush and rails on the south line, and the balance of single galvanized wire. The lines were also blazed, as they ran mostly through the timber, and a small portion of the ground was cleared and used for garden purposes. In 1880 Dickinson succeeded to the interest of the Trading Company, and continued to occupy the buildings until his death in 1888. He left surviving him his wife Sarah Dickinson, and a son and daughter, William and Sarah. The widow and son and daughter continued to occupy the buildings and to carry on the business until December, 1897."

On Dec. 2, 1897, Mrs. Dickinson sold and conveyed to Ripinski.

Upon these facts should not your Honors have held that the claim of Sarah Dickinson was protected under the proviso of section 8, of the Act of May 17th of that year, which was specially plead by the defendant? If Dickinson had the tract surveyed, enclosed, corner posts set, and "continued to occupy" the buildings on the property from 1880 to his death in 1888, then he was on the property in 1884 when the Act of May 17th went into effect; *and there is no claim of an abandonment either in the pleadings or the evidence.*

The proviso in the 8th section of the Act of May 17th, 1884, reads as follows: That the Indians or other persons in said district shall not be disturbed in the possession of any lands now actually in their use or occupation, or now claimed by them, but the

terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

By this legislation Congress manifestly intended to accomplish two things—to protect existing rights, and maintain them in *statu quo*, and to promise the ultimate title. It has been repeatedly construed by the Courts of Alaska, by this Court, and by the Land Department. For almost a quarter of a century (from 1867 to 1893) it was the only title by which non-mineral land could be held in Alaska.

Carroll v. Price, 81 Fed. 137.

Malony v. Adsit, 175 U. S. 281.

Heckman v. Sutter, 128 Fed. 393.

(And in this connection see pages 38-40 of our brief on file herein.)

In *Heckman v. Sutter*, this court says that Congress "saw proper to protect the existing possession" &c. What then is meant by the words "possession," "use," "occupancy," and "now claimed," as found in this proviso? Judge Delaney held it, *Carroll v. Price*, to not only protect these in the actual possession or occupancy, but those who had "a bona fide claim to a piece or tract of public land in the District." The authority of that decision, so far as we known, has never been questioned by any court. It has been cited with approval by the Supreme Court, and by this court, and it has certainly been regarded as a leading case by the District Courts in Alaska. It is not necessary, however, to claim all that might be

claimed under the authority of *Carroll v. Price*, if it be conceded that Congress used the words "possession," "use," and "occupancy," in the ordinary sense universally recognized by the courts. The denial of any right under the statute in *Mrs. Dickinson*, at the time of her conveyance to *Ripinski* appears to be predicated upon the fact that the enclosure erected by *Dickinson* had fallen down and disappeared, and that no use had ever been made of that portion of the tract outside buildings and garden plot. But "Nothing can be more clear than that a fence is not indispensable to constitute possession of a tract of land. The erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property. But there are many other acts which are equally evincive of such an intention of asserting such ownership and possession; such as entering upon land and making improvements thereon, raising a crop of corn, felling and selling trees thereon &c, under color of title.

"An entry into possession of a tract of land under a deed containing specific metes and bounds gives a constructive possession of the whole tract, if not in any adverse possession; although there may be no fence or inclosure round the ambit of the tract."

Elliott v. Pearl, 10 Pet. at page 442.

So with occupancy. The Supreme Court of Michigan said: "Occupancy within the meaning of

How. Ann., St. sec. 8503, which provides that, if distinct lots be occupied as one parcel, they may be sold together on foreclosure sale, does not require that all the lands be improved. The actual inclosure of a part carries with it the occupancy of a balance which is used, or intended to be used as part of one farm."

Harris v. Creveling, 80 Mich. 249.

But Congress was not dealing with farms, or with lands which were described in deeds. It was dealing with the public domain in Alaska, and protecting *Indians* and other persons. Now *Indians* are not supposed to be given to fence-building. Alaska was not a stock-raising or agricultural country. And it could hardly be supposed that it meant that if an *Indian* or other person desired the benefit of the Act he must enclose, or cultivate *all* the tract to which he laid claim. It could hardly be supposed that if a tract of sixteen acres was surveyed, corner posts set, the lines blazed, and part of this tract cultivated and built upon, that the possession and occupancy would not be held to extend to the entire tract, or that possession and occupancy would be lost simply because the fence was suffered to fall down. Under the meaning of the words as recognized by the courts, we think that under the facts found by this court, the Dickinsons were in possession and occupancy of the entire tract at the time they sold to Ripinski.

But Congress, as if out of abundant caution,

added yet another term to the rights it was protecting. Not only did it protect lands in the use and occupancy of the Indians or other persons, but it protected lands "*Now claimed by them.*" It may be readily conceded that by this clause Congress did not mean to protect every mere assertion of a right to land. But it must also be conceded that Congress did intend that the clause should add something to the words that had preceded it—it was not intended to be meaningless. Did Congress not mean then just what the Alaska courts have always held that it meant, viz: that if one in Alaska had laid a bona fide claim to a tract or parcel of the public domain, and evinced an intention so to by acts which demarked his claim and set it apart from the rest of the public domain, then he was within the protection of the law?

Now Dickinson settled and built his home upon this little tract of sixteen acres; he had it surveyed; he set his corner posts; blazed his lines, and he cultivated a portion of it. What if after his death the fences fell down, and his widow neglected or was unable to put them up? Would that destroy the bona fides of the claim, or take it out of the protection of the statute? She was living there ready, presumably to show her boundaries to all who were interested. On Dec. 2nd, 1897, she sold and conveyed to Ripinski, by deed, calling for the "Dickinson property" to which was attached a plat showing the extent and boundaries of the tract. (Rec. 1782, p. 782.) Ripinski moved in and took possession under

this deed, ten days before Fay and his associates showed up. Surely then, *under the facts found by this court, this 16-acre tract was "used," "occupied," and "claimed" by Ripinski and his grantor, and certainly his possession was "disturbed,"* within the meaning of the statute the protection of which he specially invoked in his pleadings.

We ask the court then for a rehearing upon the question, whether under the undisputed facts, Sarah Dickinson did not have a possessory right which she could and did sell to Ripinski; and whether when Ripinski went into possession under his deed on Dec. 2, 1897, of the buildings and improvements on the tract, he was not in possession of the whole tract described in the deed, viz: the tract "known as the Dickinson Property" and shown in the plat attached to the deed.

Fourth.

The decree as finally ordered by this court, is contrary to and not sustained by the pleadings in this:

Plaintiffs in their Third Amended Complaint set fourth claims to only a portion of Survey 573, while Ripinski in his answer claims the entire survey. The following parts of the survey are not claimed by any one of the plaintiffs:

Block 1, parcels 12 and 13. (These parcels in the complaint are alleged to belong to R. L. Weitzman, but R. L. Weitzman is not a party to the suit.)

Block 4, parcel 2.

Block 5, parcels 8, 9, 10, 11, and 12.

Block 6, parcels 1, 3, and 4.

This point was insisted upon on the first trial, and assigned as error, but not decided on the first appeal. On the second trial the lower court refused to pass upon anything except to marshal the findings made by the Trial Court on the first trial, where not expressly set aside by this court and the findings of this court, as gathered from the opinion, into findings upon which to base the decree. (Rec. 2015, p. 77.) Your Honors must have overlooked the fact that in addition the part of the survey awarded Ripinski, there was an additional part not claimed by any party to the suit except him, but which by the decision rendered is practically awarded to the plaintiffs.

Fifth.

The matter of costs is of some importance in this case, and in decreeing that defendant pay all costs of both trials, the court has apparently contradicted itself, or at least fallen into an inconsistency. On page 5 of the opinion rendered your Honors, speaking of the statute under which this suit was brought, say:

“The statute has its prototype in the statutes providing for the acquisition of mineral lands. Section 2326, Revised Statutes, provides for an action

of the kind in case of contest between for the same tract of mineral land. This section was amended March 3rd, 1881, (21 Stat. 505), so that if any action brought in pursuance thereof the title to the ground in controversy be not established by either party, the costs shall not be allowed to either party. While there is no such amendment or provision with respect to the statute under which this suit was instituted, yet it would seem to the reasonable course under like conditions."

The court then finds that plaintiffs have not established their right to a patent; that defendant has a right to a patent only to that part of his survey not in controversy; and adjudges the costs of both trials to the plaintiff's. It is no doubt only necessary to call the attention of the court to this matter for a correction to be made.

But in view of the importance of the question at issue, not only to the parties, but to the jurisdiction of Alaska, and especially in view of the singular turn the case took on the second trial in the court below, we are persuaded the ends of justice would be subserved by granting a rehearing, and allowing a full argument upon the controlling points in the case.

Respectfully submitted,

J. H. COBB,

Attorney for Solomon Ripinski,
Appellant and Defendant.

I, J. H. Cobb, counsel for Solomon Ripinski, Appellant, do hereby certify that in my opinion the foregoing petition is well founded and is not interposed for delay.

.....*J. H. Cobb*.....
Counsel S. Ripinski, Appellant.

